LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 720

DALLAS ROLLINS,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

FRANCIS SORIN,
Counsel for Petitioner,
880 Bergen Avenue,
Jersey City, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

BLANK PAGE

TABLE OF CONTENTS

	PAGE
THE OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR THE ALLOWANCE OF THE WRIT	5
POINT I—The Trial Court's charge on contributory negligence was erroneous	6
POINT II—The furnishing of toilets on its locomotive by the defendant made them "parts and appurtenances" under the Boiler Inspection Act	7
CONCLUSION	15
APPENDIX:	
A—Letter Opinion of Trial Judge Pindar	1a
B—Opinion of Superior Court of New Jersey, Appellate Division	8a
C—Order of Supreme Court of New Jersey Denying Petition for Certification	17a

Cases Cited

Collins v. Southern Pacific Company, 280 F. 2d 813 (9th Cir. 1961)	14
Coray v. Southern Pacific Co., 335 U. S. 520 (1949)	9
Dennis v. Denver & Rio Grande R. Co., 375 U. S. 208 (1963), rev'g, 13 Utah 2d 249, 372 P. 2d 3	9

PAGE

Ehalt v. McCarthy, 138 P. 2d 639 (S. Ct. Utah 1943).. 7-9

Lilly v. Grand Trunk R. Co., 317 U. S. 481 (1943)..3, 12, 13

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 (1926) 3, 10, 12

Southern Railway Co. v. Lunsford, 297 U. S. 398 (1936) 9

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943) 7

Urie v. Thompson, 337 U. S. 163 (1949)..... 3, 11

Statutes Cited

Federal Employers' Liability Act 5

Safety Appliance Acts 8

28 U.S.C.:

Sec. 1257 (3) 2

45 U.S.C.A. (Boiler Inspection Act):

Par. 23 .....2, 4, 5, 7, 8, 10

Par. 53 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

DALLAS ROLLINS,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

Petitioner, Dallas Rollins, prays that a writ of certiorari issue to review the judgment of the Appellate Division of the Superior Court of New Jersey in the above-entitled matter.

The Opinions of the Courts Below

The letter opinion of trial Judge Pindar is printed in the Appendix in the Court below, and is unreported. It is also printed as Appendix A hereto.

The opinion of the Appellate Division of the Superior Court of New Jersey is in the certified record of that court, is printed as Appendix B hereto, and is unreported.

The denial of petitioner's petition for certification to the Supreme Court of New Jersey is a part of the certified record of that court, is printed as Appendix C hereto, and is unreported.

Jurisdiction

The decision and judgment of the Appellate Division of the Superior Court of New Jersey, sought to be reviewed, printed as Appendix B hereto, was decided and entered on July 8, 1965.

The denial of petitioner's petition for certification to the Supreme Court of New Jersey, printed as Appendix C hereto, was decided and entered on October 4, 1965.

The jurisdiction of this Court is found in 28 U. S. Code, Section 1257 (3).

Questions Presented

1. Whether under the Federal Employers' Liability Act it is not improper to determine the percentage of contributory negligence by comparing the amount of plaintiff's negligence with the amount of defendant's negligence?

2. Whether the furnishing of toilets on its locomotives by the defendant makes them 'parts and appurtenances' under the Boiler Inspection Act?

3. Whether the decisions of the courts below in holding that the toilets furnished on locomotives by the defendant were not 'parts and appurtenances' under the Boiler In-

spection Act were not an erroneous departure from the decisions of this court in *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605 (1926); *Urie* v. *Thompson*, 337 U. S. 163 (1949) and *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481 (1943)?

Statutes Involved

"45 U.S.C.A. Sec. 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

"45 U.S.C.A. Sec. 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to

such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement of the Case

The trial of this case resulted in a jury verdict in favor of the plaintiff in the sum of $200,000.00 diminished by his contributory negligence of 62½% to $75,000.00. The trial court denied motions of the parties to disturb the verdict. Both parties appealed but the Appellate Division affirmed in all respects. Plaintiff's appeal was to set aside that portion of the verdict which diminished damages by reason of contributory negligence, on the grounds that defendant violated the provisions of 45 U.S.C.A. par. 23 (Boiler Inspection Act), and therefore the issue of plaintiff's contributory negligence improperly remained in the case, and, alternatively, that the finding of contributory negligence was contrary to the weight of the evidence and a result of an erroneous charge.

Plaintiff had been employed by defendant as a brakeman for eleven years. In the early morning of December 13, 1961, he was assigned as head-end brakeman on a local freight train which ran from Jersey City, N. J. to Enola, Pa., approximately six miles west of Harrisburg. The train consisted of about 100 cars. Plaintiff's duties were to cut off and pick up cars. His job required him to stay at the head end of the train. Shortly after the train left Morrisville, over 100 miles from Enola, plaintiff felt an urge to use a toilet. He went to the two toilets which were provided on the engine for the crew. He found that "one toilet was completely broken out and missing" and

the other had been "corroded with grease" flowing from a pump, and there was no paper and "no water—nothing to flush it to make it workable," and so it was "unsanitary". The only other toilet on the 100 car train was located in the cabin car at the back end of the train. Plaintiff testified that going from the head end to the rear end of the train would have been impractical and dangerous. At the several intervening stops, there were no toilet facilities in the yards and the stops were too brief to enable plaintiff to go to a toilet.

He told the engineman he would drop off at the east end of Enola yard at the switchman's shanty to relieve himself. The engineman OK'd this. At Enola, he went down the ladder to the bottom rung. His left foot was down ready to let go when the motor seemed to lurch forward, throwing him off balance, and his right foot tripped on something on the ground. He was already off balance and went down. At that time the train was proceeding at the normal speed of 10-15 miles per hour. Many times a day he had to get off moving trains. This was a normal speed for getting off (D6a-35 to D12a-36). He suffered severe injuries to his leg, shoulder, chest and head, when he was struck by passing cars.

Reasons for the Allowance of the Writ

This case involves fundamental questions involving the application of the Federal Employers' Liability Act with respect to contributory negligence, and the application and interpretation of the Boiler Inspection Act.

POINT I

The Trial Court's charge on contributory negligence was erroneous.

The court in its charge instructed the jury to measure the plaintiff's negligence against defendant's negligence in diminishing the verdict because of plaintiff's contributory negligence (D268a-24 to 31).

> "* * * And so if he contributed one-third and the company two-thirds, you would have to subtract one-third of the total damage from the sum total of the damage and give a verdict for the other two-thirds. * * *"

Plaintiff made an objection but the court refused to correct the charge (D275a-28 to D276a-19). "Damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C.A. 53. The amount of defendant's negligence does not matter and should not be considered by the jury. This erroneous portion of the charge is amazingly close to the percentage breakdown given in the jury's verdict even though in reverse. This erroneous charge had the capacity for misleading the jury into weighing the amount of plaintiff's negligence against the amount of defendant's negligence, and undoubtedly did mislead them. Even the Appellate Division in its opinion succumbs to this error.

> "In this negligence case predicated upon 45 U.S. C.A. par. 51 et seq. (Federal Employers' Liability Act), a jury, finding the contribution of the employer's negligence to the accident was 37½ per centum, and the contributory negligence of the plaintiff amounted to 62½ per centum, awarded plaintiff a verdict of $75,000.00. This amount represents the

defendant's proportionate share of the total damages which the jury found to be $200,000.00."

There was no evidence that plaintiff's conduct deviated in any way from the standard of reasonable care. His testimony and that of defendant's witnesses left no question but that getting off the train where he did and at that speed was standard procedure. There was no testimony that he deviated in the manner of his getting off the train. Was not the finding of contributory negligence by the jury, therefore, a determination that he assumed the risk of his calling in getting off the moving train? Assumpsit of risk is not a defense. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943).

POINT II

The furnishing of toilets on its locomotive by the defendant made them "parts and appurtenances" under the Boiler Inspection Act.

If the toilets in the locomotive were "parts and appurtenances" under the Boiler Inspection Act, the plaintiff could not legally be found contributorily negligent and would be entitled to the full verdict of $200,000.00 rather than the reduced verdict of $75,000.00. The totally disabled plaintiff and his family would be able to maintain themselves under the full verdict but will become public charges under the reduced verdict.

The trial court ruled that the factual circumstances did not present a case within the Boiler Inspection Act, citing *Ehalt* v. *McCarthy*, 138 P. 2d 639 (S. Ct. Utah 1943). The trial court does not explain or justify this ruling (D309a-21 to 25).

The Appellate Division also cites *Ehalt* v. *McCarthy*, 104 Utah 110, 138 P. 2d 639 (S. Ct. Utah 1943), and states:

> "* * * As noted in the Ehalt case, 'the positive duties laid out in Chapter 1 *pertain to mechanical defects*, inadequacies or insufficiencies in safety equipment and devices, faults in design, in type or manner of construction or defects allowed to occur through wear and tear, damage or neglect, and now perhaps * * * to substances added by nature or man, not a part of the equipment, but which make the equipment potentially unsafe * * *'"

A review of the *Ehalt* opinion disclosed that the above section was preceded by the following:

> "In general it can be said that Chapter 1 of Title 45, U.S.C.A., dealing with safety appliances and equipment, and which includes Sec. 23, the so-called Boiler Inspection Act, was designed to fasten upon the carrier the positive duty, regardless of negligence, to provide safe and adequate appliances and equipment * * *."

It is the Safety Appliance Acts which deal with "safety appliances and equipment". The Boiler Inspection Act deals with "all parts and appurtenances" of the locomotive.

The Appellate Division then makes a finding that the toilets were for employees' convenience rather than in furtherance of their safety. It further finds "an absence of a relationship between the toilets and the safety of employees in connection with their work duties, which the Act was designed to promote" which "negates the idea that a toilet was conceived to be a 'part and appurtenance' within the coverage of the Act. We are therefore satis-

fied that the trial court properly excluded the Boiler Inspection Act, and the consequence of its violation, from jury consideration."

In *Ehalt* v. *McCarthy, cited supra,* the court held that there was no liability where the equipment or appliances were in good working order but the injury occurred because of faulty operation. In view of the decisions holding transitory conditions to be violations of the Boiler Inspection Act, it is not likely that this case properly applies the law even to its special factual situation. Even if it were sound, its facts can be distinguished from our case. Rollins was confronted with conditions existing on the locomotive when it went out into service. The Utah Supreme Court has several times been reversed by the United States Supreme Court in FELA cases. See *Coray* v. *Southern Pacific Co.,* 335 U. S. 520 (1949); *Dennis* v. *Denver & Rio Grande R. Co.,* 375 U. S. 208 (1963), rev'g 13 Utah 2d 249, 372 P. 2d 3.

The only other case relied on by the Appellate Division is *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398 (1936). This case holds that the Boiler Inspection Act does not extend to safety devices which do not increase the peril and which are placed on locomotives by the carrier for experimental purposes.

Unlike the experimental device of the cited case, the undertaking to furnish toilets, the reliance of the employee thereon, and the failure to maintain them in proper working condition assuredly added to the hazards of the men working on the locomotives. A toilet furnished on a locomotive used in long haul freight is no more a device for the convenience of employees than the seats in the cab, the walkways, the ladders, cab curtains or fire doors on the locomotive. There were no other facilities than at the rear end of a 100 car train which employees at the front

end could not use without abandoning their posts at the front end. This was not an experimental device but a necessary piece of equipment for the front end men. The Boiler Inspection Act protects employees from defects and conditions which add to the hazardous work which they necessarily undertake in the operation of trains. To compel an employee who has relied on the furnishing of toilets in the locomotive to use another course to relieve himself of necessity adds to his hazard just as if he had to jump off the train because of a defective ladder. Would he not be entitled to protection if he slipped on grease on his way to the toilet? Would he not be entitled to protection if he slipped off the greasy seat and broke his back?

The Appellate Division was not justified in concluding that the toilets were solely for the convenience of the men, had no relationship to safety, and did not, therefore, come within the protection of the Boiler Inspection Act. Safety was involved because it permitted the employees to work free of the sometimes overwhelming urges of nature with the manifest affect upon the alertness, agility of the men and their ability to concentrate on their duties. The United States Supreme Court has held that equipment promoting the health and comfort of the men is within the Boiler Inspection Act even though having only an incidental effect on safety. In *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605 (1926), the United States Supreme Court said:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue, through limiting the hours of service, clearly does so, although indirectly, and it

may be found that to promote their comfort would likewise promote safety. * * *

"* * * Did Congress intend that there might still be state regulation of locomotives, if the measure was directly primarily to the promotion of health and comfort, and affected safety, if at all, only incidentally? * * *

"We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. * * *"

In *Urie* v. *Thompson*, 337 U. S. 163 (1949), an employee contracted silicosis as a result of inhaling silica dust. It was alleged that (1) the sanders were broken or faultily adjusted so as to release too much sand and (2) that the locomotive decks and cabs were in a bad state of repair admitting dust. The United Supreme Court said:

"* * * Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads 'an absolute and continuing duty to provide safe equipment.' * * *

"In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. * * *

"The congressional purpose underlying the Boiler Inspection Act is basically the same as that underlying the Safety Appliance Acts and the Employers' Liability Act. In requiring that the boiler, and not long after that, that the entire locomotive be maintained 'in proper condition and safe to operate', Congress by its own statement was attempting to

> insure that such equipment 'be employed in . . . active service . . . without unnecessary peril to life or limb . . .' 45 U.S.C. par. 23. Certain requirements of the Safety Appliance Acts, as for example the use of the automatic coupler, 45 U.S.C. par 2, are made mandatory by express statutory language. Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules enunciated by the carriers subject to the approval of the Interstate Commerce Commission, 45 U.S.C. par. 28, or directly promulgated by the Commission, * * * on the basis of proper findings. * * *
>
> "As with the Employers' Liability Act, we do not doubt that the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large, * * * from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legislative mind. * * *"

In this decision, the Supreme Court cites *Napier* v. *Atlantic Coast R. Co.*, cited *supra.*

In *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481 (1943), the United States Supreme Court said:

> "The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. Fortunately, we are not left wholly to our own resources in construing the Act in the light of its humanitarian purpose. The Interstate Commerce Commission has set the standard here by promul-

gating a rule (No. 153) that the 'Top of tender behind fuel space shall be kept clean and means provided to carry off waste water.' * * * In using the word 'clean', the Commission must have meant something more than mere manner of construction or mechanical operation, because 'clean' does not naturally lend itself to such a limited connotation. That something is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous. * * *

"The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Ry. Co.* v. *Lindsay*, 233 U. S. 42, especially when, as here, the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule. * * *

"Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to respondent. * * *

"The (Boiler Inspection) Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. * * *"

The *Lilly* case disapproved previous decisions which held that the following conditions furnished no ground for

liability under the Act: grease on a grabiron, coal upon a step leading to the locomotive cab, an ice bunker displaced by a trespasser so that it projected upon the running board, a wire wrapped around the grabirons, the failure of a fellow-employee to close a trap door in the cab over the stoker, a clinker hook misplaced on the top of the tender by a fellow-servant.

In *Collins* v. *Southern Pacific Company*, 280 F. 2d 813 (9 Cir. 1961), the court distinguished between the Safety Appliance Acts and the Boiler Inspection Act as follows:

> "Congress has seen fit to use language in the Boiler Inspection Act, which applies to locomotives, different from that in the Safety Appliance Acts, which applies to cars. Under the Boiler Inspection Act, the requirement is that the 'locomotive, its boiler, tender, and all parts and appurtenances thereof, be in proper condition and safe to operate * * *'. Under the Safety Appliance Acts the requirement is that the cars have 'secure grabirons', that they be 'equipped with secure sill steps * * *', and that they have 'secure ladders and running boards' and 'secure handholds or grabirons on their roofs. * * *'
>
> "This distinction in the requirements of the two acts appears to us to be reasonable. Under practically all circumstances a locomotive is in the personal charge and custody of the railroad, and an opportunity is provided for the maintenance of it in a safe condition. This may not be true in the case of a car which is used on many lines by many different railroads, and which may have been in the custody of consignees. It would appear to be unreasonable under such circumstances that the railroad should at all times and under all circumstances be under a positive duty to maintain its cars in a safe condition."

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

FRANCIS SORIN,
Counsel for Petitioner.

[APPENDICES FOLLOWS]

BLANK PAGE

APPENDIX A

Letter Opinion of Trial Judge Pindar

May 8, 1964

Francis Sorin, Esq.,
880 Bergen Avenue,
Jersey City 6, New Jersey.

O'Mara, Schumann, Davis & Lynch, Esqs.,
1 Exchange Place,
Jersey City 2, New Jersey.

Re: Dallas Rollins v. Pennsylvania Railroad Company
Docket No. L 20521-61

Dear Sirs:

Plaintiff herein, an employee, filed his complaint against defendant, his employer. Their relationship involved the course of interstate commerce. His duties were that of head brakeman assigned to the forward engine of a two engine freight train being transported by defendant from Jersey City, New Jersey, to Enola, Pennsylvania. Thus, as pleaded and described in the pretrial order jurisdiction was bottomed under the Act of Congress known as the Federal Employers Liability Act.

Liability *sub judice* was directed to defendant's failure to provide safe conditions for plaintiff to perform his work, specifically the assumed provisions to utilize toilet facilities upon the subject engine. Such neglect had reference to the installation of two bowls, one of which was missing and the other in a condition described as filty and not

usable. At a point enroute plaintiff was afflicted by a natural urge and had need to use the aforementioned toilet. Being unable to do so, he attempted relief as the train stopped at progressive locations where cars were changed but because of the time schedule this was not possible. Ultimately, at an initial stop entering Enola, as the train was slowed to approximately ten miles per hour, plaintiff testified he signaled that he would alight for which he said permission was granted. In doing so he reached the bottom rung of a fixed ladder on the first engine when his foot missed. Plaintiff described this as an occurring "jerk or lurch" which caused him to fall to the ground and become seriously injured.

The factor as to the manner of operation was not sufficiently proved and this contended "jerk or lurch" was excluded at trial as a proximate cause. Thereupon, plaintiff's action rested in the continuing duty of defendant to furnish reasonable safe means during the course of employment and was held as a problem for the jury to determine whether or not any breach thereof was a proximate cause of plaintiff's damages.

Defendant denied all liability, including any duty as to the toilet facilities, and contended plaintiff's injuries were solely the result of his own failure to exercise reasonable care. But it was most significant that no evidence was proffered by defendant to contradict the existing installed toilet facilities or as to their condition. Nor was any contradiction shown as to plaintiff's physical need or his efforts to get relief on prior stops.

For the reasons hereinbefore stated the court denied defendant's motion for an involuntary dismissal at the end of plaintiff's case and for judgment in favor of defend-

ant at the close of the entire case. Thereupon, the jury was charged on the issues presented.

Generally stated, the charge instructed the jury that it was necessary for them to make an initial finding of guilt of negligence on the part of defendant which was a proximate cause as well that if such negligence was so found then the tribunal should consider if any percentage of comparable negligence on the part of plaintiff was shown which was a proximate cause; and if so found against plaintiff the jury was then required to mitigate the amount of any award it determined in favor of plaintiff to the extent of plaintiff's percentage of negligence, and award plaintiff the difference. After deliberation the jury returned their verdict as follows: (a) in favor of plaintiff in the sum of $200,000, (b) that plaintiff was 62½ percent negligent, and (c) that plaintiff was awarded the sum of $75,000 against defendant.

Now, the parties make contra applications which will be described.

Defendant asserts its grounds that the verdict was (1) contrary to the weight of the evidence, (2) that the verdict was excessive, and (3) that the verdict was the result of mistake, passion, prejudice and/or partiality. Plaintiff contends (1) there was no evidence to justify the submission of contributory negligence to the jury, (2) that the defective toilets were a violation of the Boiler Inspection Act, excluding such defense of contributory negligence as not a proper issue for the jury for such a violation, (3) that the finding of contributory negligence was contrary to the weight of the evidence, (4) that the finding of contributory negligence was excessive, and (5) that the finding of contributory negligence was a result of mistake.

Appendix A

Initial consideration will be given to plaintiff's contentions (1) and (2). It is evident that the factual circumstances do not present a case within the application of the Boiler Inspection Act. *Ehalt* v. *McCarthy,* 138 P. 2d 639, 646 (S. Ct. Utah 1943).

In the light of the foregoing it must follow that the law of the case presented the factor of comparable negligence on the part of plaintiff which was a determinable issue on the element of damages for the jury. (*Federal Employers Liability Act,* 45 U.S.C.A., Chap. 2, Sec. 51.)

Next considered is the context of the contra contentions, dealing with the weight of evidence, excessiveness, mistake, passion, prejudice and/or partiality. Here the court on the respective motions is confronted with the long settled rules relating to judicial interference with the prerogatives of the jury in deciding the factual circumstances pertaining to both elements of liability and damages. In that respect the trial court will not substitute its judgment for that of the fact finding tribunal unless it can be convincingly said the verdict rendered was the result of mistake, passion, prejudice and/or partiality.

After full consideration it is concluded that a finding of 62½ percent of contributory negligence by plaintiff should not be disturbed. As to that situation the jury heard the evidence which led up to the happening, including the factor of whether plaintiff acted prudently and to what degree. The percentage of plaintiff's negligence as found by the jury was not excessive.

As to the liability of the defendant there is an utter absence of contradiction and dispute of the initial cause of lack of care for plaintiff, one of its employees, which gave rise to the question of reasonable safe maintenance for the

use by defendant under the assumed furnishing of toilet facilities on the part of defendant. In this respect the jury could have determined that the defendant failed in or breached its aforementioned duty. Thus, the weight of this question was not even debatable. Where the fact finders concluded, as they must have, within their prerogative, that there was actual and complete inability by plaintiff to utilize the toilet facilities which defendant assumed to provide, then the basic premise upon which negligence could be found was shown. In the light of that finding the jury could next come to the conclusion that plaintiff was of necessity faced with the disclosed factual situation of obtaining relief. Clearly, in the manner of their deliberation the jury could have with propriety determined that adequate fault of defendant was a proximate cause of plaintiff's injuries and damages.

The asserted excessiveness of plaintiff's initial award in the amount of $200,000 must be viewed with cautious regard for all the evidence particularly with full concern for physical and mental injury, the period of incapacity during hospitalization, treatment and convalescence, including the incidents of surgery, and all resulting disability measured by the past, present and future, as well as any loss to plaintiff relating to his capacity for, and probability of, employment as a means to earn his livelihood. Plaintiff was employed by defendant for about eleven years prior to the accident and had reached the occupational status of a head brakeman for which services he received $135 per week. It is significant to notice that but for the accident there was reasonable probability that plaintiff could continue within the opportunity of such employment and the capability to realize similar income indefinitely. At the time of trial plaintiff was forty-three years of age and it

was shown he had a life expectancy of 28.56 years. Plaintiff recovered in a reasonable manner from initial multiple injuries to his shoulders, chest and head, but sustained serious fractures that involved his right leg and right knee. Those injuries became infectious and required the application of a bolt and traction, and for extensixe pain it was necessary to prescribe sedation. Surgery was repeated for the purpose of providing stability of the lower extremity. From the medical opinion evidence it is convincing that as a proximate result of the happening plaintiff is left with a type of condition of the right knee and leg which does not permit any quality of weight bearing and not of such character as can probably be improved by any medical or acceptable recognized surgical means. Prognosis was stated as "poor" with no expected improvement, and leaving a serious and permanent deformity. It is noticed that the jury in arriving at the award could have considered this suspended disability as highly devastating, and from the standpoint of plaintiff more so than an amputated extremity which could be accommodated with an artificial member and provide weight bearing. It should be added that the medical opinion evidence indicated any "possible fusion" would be dangerous to undertake, and cannot be seriously considered.

By long settled law this question will not be determined on the basis of what the award of this court would be, if tried without a jury, or what another jury would have awarded. The true test is whether or not the award given by the tribunal, which tried the factual circumstances of the case, in the light of all the evidence, was reasonable. Additionally, it is noticed that the jury in weighing the evidence of damages could have properly, as they likely did, deliberated on proof of permanent injury with respect to

plaintiff's life expectancy, stated to be 28.56 years. Moreover, the court will not presume to apportion a jury award unless it can be fairly said to be in such an amount as to shock the court's conscience or convincingly appear to be the result of mistake, passion or prejudice on the part of the jury. This is not the situation in this case. Particularly where, as here, there appears no specific means to conclude a different amount to be awarded the trial court will not fix an alternative sum.

In the light of the foregoing this court concludes that the contra applications made by the parties should be denied, without costs. Consequently, the court finds on questions of fact and law that the verdict of the jury was not the result of mistake, passion, prejudice and/or partiality.

Counsel should present conformable order. See R.R. 4:55-1.

Very truly yours,

DAVID A. PINDAR, J. S. C.

APPENDIX B

Opinion of Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-932-63
A-933-63

DALLAS ROLLINS,

Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant-Appellant.

Argued April 26, 1965—Decided July 8, 1965

Before Judges Gaulkin, Foley and Collester

Mr. Francis X. Kennelly argued the cause for appellant (*Messrs. O'Mara, Schumann, Davis & Lynch*, attorneys, *Mr. James E. Flynn* on the brief).

Mr. Francis Sorin argued the cause for respondent.

The opinion of the court was delivered by
FOLEY, J. A. D.

In this negligence case predicated upon 45 U. S. C. A. §51 *et seq.* (Federal Employers' Liability Act), a jury, finding

the contribution of the employer's negligence to the accident was 37½ per centum, and the contributory negligence of the plaintiff amounted to 62½ per centum, awarded plaintiff a verdict of $75,000. This amount represents the defendant's proportionate share of the total damages which the jury found to be $200,000.

Thereafter, defendant moved for judgment n.o.v. under R.R. 4:51-2, and for a new trial because the verdict was contrary to the weight of the evidence and excessive. Plaintiff moved for an order setting aside that portion of the verdict which diminished damages by reason of contributory negligence, on the grounds that defendant violated the provisions of 45 U. S. C. A. §23 (Boiler Inspection Act), and therefore the issue of plaintiff's contributory negligence was removed from the case, and, alternatively, that the findings of contributory negligence, and the proportionate extent therof were contrary to the weight of the evidence.

The trial court denied the motions of both parties. Defendant appeals, plaintiff cross-appeals.

Preliminarily, we set forth the pertinent federal statutes upon which the proofs and the arguments offered by both parties must be considered. The Federal Employers' Liability Act creates a cause of action in favor of an employee against a railroad engaged in interstate commerce for injury resulting in whole or in part from the negligence of "any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, applicants, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. A. §51.

Appendix B

45 U. S. C. A. §53 provides that contributory negligence of an employee "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured * * * shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute *enacted for the safety* of employees contributed to the injury * * *." (Emphasis added.)

The Boiler Inspection Act, *supra,* provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and *all parts and appurtenances* thereof are in proper condition and *safe to operate* in the service to which the same are put * * *." 45 U. S. C. A. §23 (Emphasis added.)

Plaintiff had been employed by defendant as a brakeman for eleven years. In the early morning of December 13, 1961 he was assigned as head-end brakeman on a local freight train which ran from Jersey City, N. J. to Enola, Pa., approximately 6 miles west of Harrisburg. The train consisted of about 100 cars picked up at Waverly, N. J. and Morrisville, Pa., some of which were to be set off at several railroad yards *en route* to Enola. Morrisville is about 100 miles from Enola. Plaintiff's duties were to cut off the motor in order to set off or pick up cars by coupling or uncoupling them. His job required him to stay at the head of the train. Shortly after the train left Morrisville plaintiff felt an urge to use a toilet. He went to the engine where two toilets had been provided by the railroad for the use of the crew. He found that "one toilet was completely broken out and missing" and the other had been "cor-

roded with grease" flowing from a "pump" and there was "no paper" and "no water—anything to flush it to make it workable," and so it was "unsanitary." The only other toilet on the 100 car train was located in the cabin car at the "very back end of the train." Plaintiff testified that going from the head end to the rear end of the train would have been impractical and dangerous. At the several intervening stops there were no toilet facilities in the yards, and the stops were too brief to enable plaintiff to go to a toilet on railroad property.

According to plaintiff, as the train reached the east end of Enola, about a mile from its destination, he told the engine operator that the would drop off and use a switchman's shanty nearby to relieve himself. At that time the train was proceeding at the normal approach speed of 10 to 15 miles per hour. Plaintiff had often detrained at that speed. He said that he descended the rungs of a ladder and was about to step off when the train suddenly lurched and threw him off balance. As he touched the ground his right foot tripped on something causing him to fall. He suffered severe injuries to his leg, shoulder, chest and head, when he was struck by passing cars.

Defendant's Appeal.

At the conclusion of the entire case defendant moved for a judgment of involuntary dismissal on the ground that there was insufficient evidence of defendant's negligence to send the case to the jury. Defendant argued that neither the condition of the toilet, the lurch which occurred as plaintiff attempted to alight from the train, nor the ground surface upon which plaintiff tripped and fell, could be said to be violative of defendant's obligation to provide plaintiff with a safe place to work. After extended argument the trial court held:

> "* * * the evidence of a lurch or jerk of the train is insufficient in and of itself to sustain a legal inference [sic] on the part of the Defendant, and that situation will be covered in my charge. However, in considering this motion in the light of the evidence relating to the existence of inadequate or defective toilet facilities, I have concluded a legitimate inference exists for the jury to find whether or not the need of the Plaintiff to disembark was a proximate cause of the Plaintiff's damages and Defendant's liability therefor, * * *."

The court charged with clarity and at length on the subjects of negligence and proximate cause. Defendant offered no objection to the charge.

On this appeal defendant's argument is somewhat more limited than it was below. On the issue of liability defendant contends only that the court erred in submitting the issue of proximate cause to the jury, *i.e.*, that the alleged breach of common law duty to provide a safe place to work, based upon the condition of the toilets, did not provide reason for the jury to conclude "that this in any way produced the result that followed." Defendant says also that the "injury which resulted was solely the consequence of his own negligence."

It is generally accepted that a defendant's conduct is deemed "a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men could not differ." *Prosser, Torts,* p. 244 (3d ed. 1964). This formula for determining causation has been approved by the courts of this State. See *Rappaport* v. *Nichols,* 31 N. J.

188, 203 (1959); and see also *Lutz* v. *Westwood Transportation Co.*, 31 N. J. Super. 285, 289 (App. Div. 1954), certification denied 16 N. J. 205 (1954).

Assuming, as we do, that defendant does not challenge the defective maintenance of the toilets as actionable common law negligence, we believe that the court properly left to the jury the determination of whether such negligence was a proximate cause of plaintiff's effort to relieve himself, and whether the means he took to do so were those of a reasonably prudent person in the circumstances in which plaintiff found himself. *Cf. Mitchell* v. *Friedman*, 11 N. J. Super. 344 (App. Div. 1951).

The only other ground of appeal advanced by defendant is that the total award of $200,000 was excessive. This contention is based in large part upon the following circumstances: The jury was directed by the court to answer five interrogatories: (1) whether defendant was guilty of any negligence, regardless of degree, which was a proximate cause of the accident; (2) whether plaintiff was guilty of any negligence, regardless of degree, which was a contributing proximate cause of the accident; (3) if the answer to question 2 was "yes," what fraction or percentage was the proportion in which plaintiff's negligence proximately contributed to the happening of the accident; (4) if the answer to question 1 was in the affirmative, state the total amount of damages which plaintiff would be entitled to for his injuries; (5) if the answers to questions 1 and 2 were in the affirmative, state the amount of damages plaintiff was entitled to against defendant by calculating the difference between the total amount of damage found and the percentage attributable to plaintiff's negligence. When the jury returned to the courtroom after deliberation, it

announced that its answers to questions 1 and 2 were "yes." In answer to question 3 it stated that the plaintiff's negligence contributed to the accident by 62½%. In answer to question 4 it fixed the "total amount" of damages as $75,000. In answer to question 5, the foreman of the jury stated that it calculated the difference between the total amount of damages found and the fraction or percentage attributable to plaintiff's negligence as follows: "We showed total $200,000—62½ percent, $125,000."

The colloquy which followed between the court and the members of the jury indicated that the jury intended to fix $200,000 as the total damages and return a verdict against the defendant of $75,000 based upon the percentage of his negligent contribution to the accident which the jury had found. The trial court, recognizing the jury's confusion implicit in its answers to questions 4 and 5, returned it to the jury room. Thereafter the jury returned the verdict as entered, fixing $200,000 as plaintiff's total damages.

Defendant argues that these proceedings reflect that the jury, influenced by sympathy for the plaintiff, fixed the sum of $200,000 as total damages in order to render a $75,000 verdict against the defendant. In other words, defendant says that the "total damages" were adjusted by the jury to accommodate its award against defendant. While the point is arguable, there is no convincing evidence that it is founded in fact. Therefore, the test we must employ is whether or not the assessment of $200,000 is contrary to the weight of the evidence.

We are not greatly aided by defendant's argument on this aspect of the case. Defendant only briefly, and in only the most general way, and without analyzing the facts argues that such assessment was excessive, and we are left

to our own devices to examine the record in detail. Having done so, we conclude the evidence of the nature, extent and duration of plaintiff's injuries, their effect upon his ability to pursue his livelihood, his earnings in his occupation, and his life expectancy, was such that we can not say that the jury's evaluation of his total damages was reversibly excessive.

PLAINTIFF'S CROSS-APPEAL

Upon the trial, and the post trial motions above referred to, plaintiff argued that, independent of the common law obligation of defendant to provide a safe place to work, violation of the Boiler Inspection Act created absolute liability and barred the defense of contributory negligence under 45 U.S.C.A. §53, *supra.* On this appeal plaintiff reiterates this argument and contends that, since contributory negligence is not a defense against liability under the Boiler Inspection Act, judgment should be entered in plaintiff's favor for his total damages—$200,000, rather than $75,000.

The precise question for determination is whether or not the toilets in question are to be viewed as "parts or appurtenances" of the locomotive or boiler within the purview of 45 U.S.C.A. §23 *supra,* and thus whether defendant was under an absolute obligation to keep them in proper condition and safe to operate in the service to which the same were put. See generally *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398, 401, 80 L. Ed. 740, 742 (1936).

The Boiler Inspection Act, a part of 45 U.S.C.A. §1 *et seq.,* (Safety Appliance Act), was designed to fasten upon the carrier absolute liability for its failure to provide safe and adequate appliances and equipment regardless of

the employee's negligence. See *Ehalt* v. *McCarthy,* 104 Utah, 110, 138 P. 2d 639, 644 (1943). As noted in the *Ehalt* case, "the positive duties laid out in Chapter 1 pertain to mechanical defects, inadequacies or insufficiencies in safety equipment and devices, faults in design, in type or manner of construction or defects allowed to occur through wear and tear, damage or neglect, and now perhaps * * * to substances added by nature or man, not a part of the equipment, but which make the equipment potentially unsafe * * *." 138 P. 2d at p. 645.

Despite the volume of law interpreting the scope of the Boiler Inspection Act, and the Safety Appliance Act, no case has been cited to us, nor has any come to our attention, where the carrier has been held liable for the improper maintenance of a defective toilet which has been installed for the convenience of employees, or for the negligent maintenance of any other similar object or appliance directed solely to the service of employees' convenience, as distinguished from one installed in furtherance of their safety. Considering the context in which "parts and appurtenances" appears in the Act, as hereinabove set out, it is our view that the absence of a relationship between the toilets and the safety of the employees in connection with their work duties, which the Act was designed to promote, negates the idea that a toilet was conceived to be a "part or appurtenance" within the coverage of the Act. We are therefore satisfied that the trial court properly excluded the Boiler Inspection Act, and the consequences of its violation, from jury consideration.

Accordingly, the judgment is affirmed in all respects. No costs.

APPENDIX C

Order of Supreme Court of New Jersey Denying Petition for Certification

SUPREME COURT OF NEW JERSEY

C-20

DALLAS ROLLINS,

Plaintiff-Petitioner,

and

THE PENNSYLVANIA RAILROAD CO.,

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 4th day of October, 1965.

JOHN H. GILDEA
Clerk of the Supreme Court.